

No. 16072 ✓

United States
Court of Appeals
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a corporation, Appellant,

vs.

NORTHWEST CASUALTY COMPANY, a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

SEP 3 - 1958

PAUL P. O'BRIEN, CLERK

No. 16070

United States
Court of Appeals
for the Ninth Circuit

MAX ASUNCION TUGADE, Appellant,

vs.

RICHARD C. HOY, District Director, Immigration
and Naturalization Service,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LLOYD A. TASOFF,
ROBERT H. GREEN,

1212 Spring Arcade Building,
541 South Spring Street,
Los Angeles 13, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

NORMAN R. ATKINS,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 511-57-TC

MAX ASUNCION TUGADE, Plaintiff,

vs.

ALBERT DEL GUERCIO, as District Director
for the Los Angeles District, Immigration and
Naturalization Service, United States Depart-
ment of Justice, Defendant.

COMPLAINT—PETITION FOR REVIEW

To the Honorable Judges of the United States Dis-
trict Court for the Southern District of Cali-
fornia:

Plaintiff, by his attorney, Philip Barnett, for his
petition for review and complaint herein, respect-
fully shows to this Court and alleges:

I.

The United States District Court for the South-
ern District of California has jurisdiction of this
complaint under the provisions of Title 5, United
States Code, section 1009, Title 8, United States
Code, section 1329 and Title 28, United States
Code, section 2201, et seq.

II.

Plaintiff resides at 300 North Fremont, Apt. 5,
Los Angeles, California, within the Southern Dis-
trict of California. [2]

III.

The defendant, Albert Del Guercio, is the District Director of the Los Angeles District of the Immigration and Naturalization Service, and is the official who has final authority to issue and has issued a warrant directing plaintiff's deportation from the United States. The said defendant is vested with authority to execute the said order and warrant of deportation and to stay its execution.

IV.

The official residence of the defendant is at 458 So. Spring Street, Los Angeles, California, within the Southern District of California.

V.

Plaintiff, Max Asuncion Tugade, is a native and citizen of the Philippine Islands, who last entered the United States at Wilmington, California, on May 16, 1925, and was a permanent resident of the United States.

VI.

On or about September 10, 1953 the defendant herein caused to be instituted against plaintiff a deportation proceeding by the issuance and service of an immigration warrant for plaintiff's arrest.

VII.

The aforesaid warrant charged that plaintiff is subject to be taken into custody and deported pursuant to the provisions of section 241 (a) (11) of the Immigration and Nationality Act, in that, the plaintiff had been convicted of a law relating to

the illicit traffic in narcotic drugs: Possession of Heroin.

VIII.

Plaintiff was accorded a hearing pursuant to the aforesaid charge before a Special Inquiry Officer of the Immigration and Naturalization Service. In the course of the said hearing [3] plaintiff denied that he was subject to deportation on the charge lodged against him in the warrant of arrest.

IX.

The plaintiff was denied a fair hearing and denied his constitutional right to due process of law in that the evidence submitted against him was in the form of hearsay evidence, without the presentation of the persons and without the opportunity to cross examine the said persons.

X.

The finding of deportability is based on facts and conclusions of law not pertinent to this plaintiff.

XI.

That the finding of deportability was in violation of the provisions of section 242(2) of the Immigration and Nationality Act which expressly provides that no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

XII.

Plaintiff took exception to the finding of deportability predicated upon the evidence that plaintiff "entered" the United States as an alien and ap-

pealed from said finding to the Board of Immigration Appeals. The said Board dismissed plaintiff's appeal.

XIII.

Plaintiff has exhausted his administrative remedies.

XIV.

Defendant herein, pursuant to a final finding of deportability, has issued a warrant for plaintiff's deportation and has indicated that he is proceeding to execute the same by deporting plaintiff from the United States.

XV.

Wherefore, plaintiff prays for the following relief together with such other further relief which this Court may deem [4] just and proper.

1. Plaintiff prays that a temporary injunction issue restraining and enjoining the defendant from executing the outstanding order and warrant for his deportation pending the determination of this proceeding.

2. Plaintiff further prays that a permanent injunction be granted restraining and enjoining the defendant from executing the outstanding order and warrant for his deportation.

3. Plaintiff further prays that a declaratory judgment be made herein declaring the outstanding order and warrant for his deportation null, void and unenforceable.

/s/ PHILIP BARNETT,

Attorney for Plaintiff. [5]

[Endorsed]: Filed April 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Albert Del Guercio, District Director for the Los Angeles District, Immigration and Naturalization Service, and in answer to the complaint on file herein admits, denies and alleges as follows:

I.

Neither admits nor denies the allegations contained in paragraph I on the ground that said allegations are conclusions of law.

II.

Referring to the allegations contained in paragraph II, defendant has no knowledge or information on which to form a belief and on that ground denies said allegations. [6]

III.

Admits the allegations contained in paragraph III.

IV.

Admits the allegations contained in paragraph IV.

V.

Admits the allegations contained in paragraph V.

VI.

Referring to the allegations contained in paragraph VI, defendant admits that the defendant herein caused to be instituted against plaintiff a

deportation proceeding by the issuance and service of an immigration warrant for plaintiff's arrest, and further alleges that the warrant of arrest was issued September 4, 1953, and served on plaintiff herein on September 10, 1953.

VII.

Admits the allegations contained in paragraph VII.

VIII.

Referring to the allegations contained in paragraph VIII, defendant admits that plaintiff was accorded a hearing pursuant to the aforesaid charge before a Special Inquiry Officer of the Immigration and Naturalization Service. Each and every other allegation contained in paragraph VIII is denied.

IX.

Denies each and every allegation contained in paragraph IX.

X.

Denies each and every allegation contained in paragraph X.

XI.

Denies each and every allegation contained in paragraph XI.

XII.

Admits the allegations contained in paragraph XII.

XIII.

Admits the allegations contained in paragraph XIII. [7]

XIV.

Referring to the allegations contained in paragraph XIV, defendant admits that he has, pursuant to a final finding of deportability, issued a warrant for plaintiff's deportation. Each and every other allegation is denied, and it is further alleged that defendant will not remove the plaintiff from the jurisdiction of the Court during the pendency of the within action.

For A Further, Separate, First Affirmative Defense to Said Complaint, Defendant Alleges:

I.

The plaintiff has been accorded a full and fair hearing in conformity with law to determine his right to be and remain in the United States. There will be offered in evidence when this cause is tried a certified record of the Immigration and Naturalization Service, Department of Justice, relating to the plaintiff, containing the complete record of the deportation proceedings before the Immigration and Naturalization Service.

For A Further, Separate and Second Affirmative Defense to Said Complaint, Defendant Alleges:

I.

Plaintiff's complaint on file herein fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said complaint, denying the relief prayed

for herein, and for such other relief as to the Court seems just and proper in the premises. [8]

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

NORMAN R. ATKINS,
Assistant U. S. Attorney,

/s/ NORMAN R. ATKINS,
Attorneys for Defendant. [9]

Affidavit of Service by Mail Attached. [10]

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

ORDER FOR FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This cause having come before the court for hearing upon the petition and complaint of Max Asuncion Tugade, filed April 25, 1957, for declaratory relief and review of the finding of deportability under Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended by Section 301(b) of the Narcotic Control Act [8 U.S.C. § 1251(a)(11)], made by the Immigration and Naturalization Service; and the cause having been heard and submitted for decision; and it appearing to the court that:

(1) plaintiff is an "alien" [Philippine Independence Act of 1934, 48 Stat. 456, 48 U.S.C. § 1238(a)(1); *Cabebe v. Acheson*, 183 F. 2d 795 (9th Cir. 1950)];

(2) since plaintiff was convicted of unlawful possession of narcotics, he is within a deportable class under 8 U.S.C. § 1251(a)(11); and

(3) in order that plaintiff may be deported under 8 U.S.C. § 1251(a)(11), it is not required that plaintiff have entered the United States as an alien [*Rabang v. Boyd*, 234 F. 2d 904, 905 (9th Cir. 1956), *aff'd*, 353 U.S. 427, 431-33 (1957); *cf.* [11] *Gonzales v. Barber*, 207 F. 2d 398, 401-2 (9th Cir. 1953), *aff'd*, 347 U.S. 637 (1954)].

Accordingly It Is Ordered that findings of fact, conclusions of law, and judgment are ordered in favor of defendant and against plaintiff, and the same will be lodged with the Clerk by the attorney for defendant, pursuant to local rule 7, within 10 days.

It Is Further Ordered that the Clerk this day shall serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated January 21, 1958.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed January 21, 1958.

United States District Court, Southern District
of California, Central Division

Civil No. 511-57-TC

MAX ASUNCION TUGADE, Plaintiff,

vs.

ALBERT DEL GUERCIO, as District Director
for the Los Angeles District, Immigration and
Naturalization Service, United States Depart-
ment of Justice, Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

The above-entitled matter having come on for trial on January 20, 1958, in the above entitled Court before the Honorable Thurmond Clarke, Judge presiding without a jury; plaintiff being represented by his attorney, Philip Barnett, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, Richard A. Lavine and Norman R. Atkins, Assistant United States Attorneys, by Norman R. Atkins; and counsel for the parties hereto having stipulated that a certified record of the deportation proceedings relating to the plaintiff should be received in evidence, and the Court having received the same; and the Court having heard the arguments of counsel, and having taken the within cause under submission; the Court having reviewed the aforementioned [13] record of deportation proceedings

relating to the plaintiff and being further advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff resides in the City of Los Angeles, California, within the Southern District of California.

II.

Plaintiff was born in the Philippine Islands in 1903. Plaintiff entered the United States at Wilmington, California, on May 16, 1925.

III.

On July 29, 1953, the plaintiff was convicted in the Superior Court of Los Angeles, California, for the offense of possession of narcotics (heroin) in violation of Section 11500 of the Health and Safety Code of California.

IV.

A hearing in deportation was held on September 25, 1955, and on October 4, 1956; that the Special Inquiry Officer at said deportation hearing did, after hearing, find that plaintiff is subject to deportation on the ground that he was convicted at any time of a violation of any law or regulation relating to the illicit possession of narcotic drugs, under the provisions of Section 241(a)(11) of the Immigration & Nationality Act of 1952 [8 U.S.C.A. 1251(a)].

V.

Plaintiff is an alien, a native and citizen of the Philippine Islands.

Conclusions of Law

I.

This Court has jurisdiction of the within cause under the provisions of Section 10 of the Act of June 11, 1946 [Administrative [14] Procedures Act], 60 Stat. 243, 5 U.S.C.A. § 1009.

II.

That the Immigration officials who acted in connection with the deportation proceedings relating to plaintiff had jurisdiction and authority to act.

III.

There is reasonable, substantial and probative evidence to support the decision of deportability, the Order of Deportation, and the Warrant of Deportation outstanding against the plaintiff.

IV.

The deportation proceedings relating to the plaintiff were fair, in accordance with law, and were in accordance with the plaintiff's constitutional rights.

V.

Plaintiff is an alien, a native and citizen of the Philippine Islands.

VI.

Plaintiff having been convicted on July 29, 1953,

of the offense of possession of narcotics (heroin) in violation of Section 11500 of the Health and Safety Code of California, is within a deportable class pursuant to Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended.

VII.

Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended, does not require that an alien have entered the United States as an alien as a prerequisite to deportation; that whether plaintiff entered the United States as an alien or not is irrelevant to the issues of this case.

VIII.

The Order of Deportation outstanding against the plaintiff and the Warrant of Deportation based thereon are valid and the [15] plaintiff is deportable, pursuant to said Order and Warrant.

IX.

Judgment should be entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's complaint, and awarding to the defendant his costs incurred herein.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. That judgment is hereby entered in favor of the defendant and against the plaintiff, denying

the relief prayed for in plaintiff's complaint;

2. That the final Order of Deportation of the plaintiff herein by the Immigration and Naturalization Service is a valid order and is hereby affirmed;

3. That the defendant have his costs incurred herein in the sum of \$20.00 as and for a docket fee, pursuant to 28 U.S.C. 1923.

Dated: January 31, 1958.

/s/ THURMOND CLARKE,
United States District Judge.

Affidavit of Service by Mail Attached. [17].

[Endorsed]: Filed and Entered January 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Now the plaintiff Max Asuncion Tugade and appeals to the Court of Appeals of the United States from the judgment and the whole thereof.

Dated: March 6, 1958.

LLOYD A. TASOFF and
ROBERT H. GREEN,
/s/ By ROBERT H. GREEN,
Attorneys for Plaintiff-
Appellant. [20]

Affidavit of Service by Mail Attached. [21]

[Endorsed]: Filed March 17, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the United States District Court,
for the Southern District of California, Central
Division:

You Will Please Take Notice that the plaintiff
and appellant designates, in accordance with Rule
75 of the Rules of Civil Procedure, the following
as the record on appeal:

1. Complaint.
2. Answer.
3. Findings of Fact, Conclusions of Law and
Judgment.
4. Order for Findings of Fact, Conclusions of
Law and Judgment.
5. Notice of Appeal. [26]

The appellant is informed and believes that no
evidence was heard, adduced or taken at the trial
and there is no stenographic record to be included
within the record on appeal.

The appellant will rely upon the following points
for a reversal of the judgment:

- (a) The appellant did not enter the United States
as an alien, and is therefore not subject to depor-
tation.
- (b) At the time of the appellant's conviction

of the offense of possession of heroin under Section 11,500 of the Health and Safety Code of the State of California, that offense was not grounds for deportation; therefore, to deport the appellant following the amendment of the Immigration and Naturalization Act of 1942 is a violation of the appellant's constitutional rights, and specifically would violate the provisions of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States.

(c) If the Philippine Independence Act of 1934 changed the status of the appellant from a citizen national to that of an alien, to therefore permit deportation for an offense committed under the laws of the State of California (which offense was not deportable when it was committed) would be a violation of the Constitution of the United States as applied to the appellant, and therefore void.

(d) To permit the appellant's deportation for an offense committed under the laws of the State of California which would not be a deportable offense at the time of its commission is a violation of the appellant's constitutional rights and a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and, therefore, void.

(e) The United States District Court committed reversible error in (1) determining that the appellant is an alien, (2) determining that the appellant was deportable under the laws of the [27] United

States, (3) determining that the appellant entered the United States as an alien, and (4) ordering the appellant to be deported.

LLOYD A. TASOFF and
ROBERT H. GREEN,
/s/ By ROBERT H. GREEN,
Attorneys for Plaintiff and
Appellant. [28]

Affidavit of Service by Mail Attached. [29]

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL
PORTIONS OF THE RECORD

To the Clerk of the United States District Court,
for the Southern District of California, Cen-
tral Division:

You Will Please Take Notice that the defendant and appellee designates, in accordance with Rule 75(a) of the Rules of Civil Procedure, the following as the record on appeal:

1. All of those portions of the record designated by plaintiff in his Designation of Contents of Record on Appeal filed herein.
2. In addition thereto, the certified Administrative Record of the Immigration and Naturalization Service relating to the plaintiff which was intro-

duced as a Government Exhibit in the trial of the said action. [30]

LAUGHLIN E. WATERS,
 United States Attorney,
 RICHARD A. LAVINE,
 Assistant U. S. Attorney,
 Chief of Civil Division,
 NORMAN R. ATKINS,
 Assistant U. S. Attorney,
 /s/ NORMAN R. ATKINS,
 Attorneys for Defendant and
 Appellee. [31]

Affidavit of Service by Mail Attached. [32]

[Endorsed]: Filed June 20, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 32, inclusive, containing the original:

Petition for Review.

Answer.

Order for Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Substitution of Attorneys.

Notice of Appeal.

Affidavit for extension of time to file agreed Statement on Appeal.

Affidavit for extension of time to file record on Appeal and Order thereon.

Designation of Contents of Record on Appeal (Appellant).

Designation of Additional Portions of the Record (Appellee).

B. Administrative File of Immigration and Naturalization Service re Max Asuncion Tugade.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: 6/30/58.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16070. United States Court of Appeals for the Ninth Circuit. Max Asuncion Tugade, Appellant, vs. Richard C. Hoy, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: July 1, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

